

Office of Chief Counsel
Internal Revenue Service

memorandum

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JForsberg

date: May 29, 2001

to: Allen Davey, Team Manager
Des Moines, Iowa

from: Associate Area Counsel (LMSB)
St. Paul, Minnesota,

subject: [REDACTED] & [REDACTED]
Form 872 for the TYE [REDACTED]

Our advice has been requested as to the proper parties to execute, and the proper form for, Forms 872 for the [REDACTED] consolidated group's taxable year ended [REDACTED], and the [REDACTED] consolidated group's taxable year ended [REDACTED]. For the reasons indicated, we believe that the Forms 872 should be prepared and executed in the manner set forth below.

FACTS

[REDACTED] (EIN [REDACTED]) (" [REDACTED] ") was a Kansas corporation which filed a consolidated return as the parent corporation of a consolidated group for the short taxable year ended [REDACTED]. [REDACTED] return for its TYE [REDACTED] was filed on [REDACTED].

[REDACTED] (EIN [REDACTED]) (" [REDACTED] ") was an Iowa corporation which filed a consolidated return as the parent corporation of a consolidated group for the taxable year ended [REDACTED]. [REDACTED]'s return for its TYE [REDACTED] was filed on [REDACTED]. [REDACTED] (" [REDACTED] ") was a Kansas Corporation which was a wholly-owned subsidiary of [REDACTED]. [REDACTED] was a transitory merger subsidiary formed in connection with [REDACTED] acquisition of [REDACTED].

On or about [REDACTED], [REDACTED] acquired [REDACTED] in a transaction intended to be a tax-free reorganization under I.R.C. § 368(a)(1)(B)&(a)(2)(e). The acquisition was accomplished as follows: [REDACTED] merged with and into [REDACTED], with [REDACTED] being the surviving corporation; the stock of

██████████ was converted into ██████████ stock; and stock of ██████████ was converted into stock of ██████████. By virtue of the merger, ██████████ became a wholly-owned subsidiary of ██████████ and a member of the ██████████ consolidated group.

██████████ (EIN ██████████) ("██████████") is an Iowa corporation which files consolidated returns as the parent corporation of a consolidated group. On ██████████, ██████████ merged into ██████████ with ██████████ being the surviving company and with the stock of ██████████ being converted into ██████████ stock. Concurrently with the merger, ██████████ amended its articles of incorporation to change its name to "██████████" ██████████'s separate corporate existence terminated by virtue of the merger. Under IOWA CODE §490.1106, §1c (2001), ██████████, as the surviving corporation in the merger, assumed all liabilities of ██████████.

By virtue of the ██████████ merger, ██████████ became a member of the ██████████ (now ██████████) consolidated group. It is our understanding that ██████████ continues in existence and has not been merged, dissolved, or been through a name change.

DISCUSSION

Treas. Reg. § 1.1502-77(a) provides generally that the common parent of a consolidated group is the sole agent for each subsidiary in the group for any consolidated return year. Expressly included in the authority of the common parent is the power to give waivers. Treas. Reg. § 1.1502-77(a) further provides that its provisions shall apply "whether or not a consolidated return is made for any subsequent year, and whether or not one or more subsidiaries have become or have ceased to be members of the group at any time."

Treas. Reg. § 1.1502-77T provides for alternative agents where a corporation that is the common parent of a group ceases to be the common parent. Under Treas. Reg. § 1.1502-77T(a)(3) & (4), a waiver of the statute of limitations given with respect to the group will be deemed to be given by the agent for the group if it is given by any of the following:

(i) The common parent of the group for all or any part of the year to which the notice or waiver applies,

(ii) A successor to the former common parent in a transaction to which section 381(a) applies,

(iii) The agent designated by the group under § 1.1502-77(d), or

(iv) If the group remains in existence under § 1.1502-75(d)(2) or (3), the common parent of the group at the time the notice is mailed or the waiver given.

I.R.C. § 381(a)(2) provides that that section applies, inter alia, to the acquisition of assets of a corporation by another corporation in a transfer to which section 361 applies and the reorganization is described in I.R.C. § 368(a)(1)(A).

_____ taxable year ended _____

The _____ group ceased to exist after _____ acquired _____ in _____. However, the corporate existence of _____ continued unabated, albeit initially as part of the _____ group and later as part of the _____ (now _____) group. Accordingly, _____ continues as agent for the _____ group's pre-merger years, notwithstanding that the group itself has ceased to exist. Thus, _____ can continue to execute waivers for the _____ group's taxable year ended _____.

In preparing the Form 872 for the _____ group's taxable year ended _____, we recommend that:

1. The taxpayer's name read:

_____ (EIN _____) as agent for the consolidated group*

The following footnote should be put at the bottom of the page:

* with respect to the consolidated income tax liability of _____ (EIN _____) and Affiliated Corporations.

2. _____ EIN (_____) should be used as the taxpayer's EIN.

3. The signature block should use name " _____ " and should be executed by a current officer of _____. See, Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

taxable year ended .

(now) can execute consents for the group's taxable year ended , as agent for the group under Treas. Reg. § 1.1502-77T(a)(4)(ii). Technically, however, was not itself a member of the group prior to the merger. As such, is arguably not liable for the group's tax for the taxable year , even though it is an agent for the group for that year. Iowa law, however, provides that the surviving corporation in a merger assumes all liabilities of the constituent corporations. Hence, under state law, succeeds to several liability for the consolidated tax liability of the group.

To ensure that the Service can proceed against both and the remaining members of the group, we recommend that the Form 872 be prepared as follows:

1. The line for the taxpayer's name at the top of the first page of the Form 872 should read:

(EIN), formerly , as agent for the consolidated group and as successor-in-interest to (EIN)*

The following footnote should be put at the bottom of the first page:

* with respect to the (EIN) consolidated group for the taxable year ended .

2. The EIN of (EIN) should be used in the box for the taxpayer's EIN in the upper right corner of the first page of the Form 872.

3. The signature block on the second page of the Form 872 should use name " (EIN) , formerly " and should be executed by a current officer of . See, Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

Additional Matters.

At the time the Forms 872 are solicited, the taxpayer should be advised of its right refuse to extend the statute or limit the scope of the extension as provided under I.R.C. § 6501(c)(4)(B). I.R.C. § 6501(c)(4)(B) requires that the IRS advise taxpayers of

their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that it solicits a statute extension. To satisfy this requirement, you may provide the taxpayer with Publication 1035 ("Extending the Tax Assessment Period") at the time you solicit the Form 872. Alternatively, you may advise the taxpayer orally or in some other written form of the I.R.C. § 6501 requirement. Regardless of which method you use, you should document your actions in this regard in the case file. Although section 6501(c)(4)(B) does not provide a sanction or penalty on the Service's for failure to comply with the notification requirement, a court might conclude that an extension of the statute of limitations is invalid if the Service did not properly notify the taxpayer. Thus, it is important to document your actions in this regard in the case file.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

If you have any questions respecting this matter, please call Jack Forsberg at (651) 290-3473, ext. 227.

REID M. HUEY
Associate Area Counsel (LMSB)

By: *Jack Forsberg*
JACK FORSBERG
Special Litigation Assistant

cc: Associate Chief Counsel (Procedure and Administration); and
Barbara Franklin (CC:LM).